(13)

No. 03-6821

In The Supreme Court of the United States

DAVID L. NELSON,

Petitioner,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	4
I. MR. NELSON'S COMPLAINT IS COGNIZABLE UNDER § 1983	4
A. *Heck* and *Preiser* Authorize the Review Sought By Mr. Nelson	6
B. A Federal Court Has Authority to Grant the Relief Sought By Mr. Nelson Under § 1983	7
II. EVEN IF MR. NELSON'S § 1983 COMPLAINT WERE TO BE TREATED AS A HABEAS CORPUS PETITION, IT WOULD NOT BE BARRED AS A SUCCESSOR BECAUSE, LIKE THE HABEAS PETITION AT ISSUE IN MARTINEZ-VILLAREAL, IT PRESENTS A CLAIM THAT WAS NOT RIPE AT THE TIME OF ANY PRIOR HABEAS PROCEEDINGS	10
III. THERE ARE NO PROCEDURAL BARRIERS TO REVIEW OF MR. NELSON'S CLAIM	15
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

In re Cain, 137 F.3d 234 (5th Cir. 1998) 15

Cooper v. Rimmer, ___F.3d___, 2004 WL 232377 (9th Cir. Feb. 8, 2004) 14

Crouch v. Norris, 251 F.3d 720 (8th Cir. 2001) 15

Edwards v. Balisok, 520 U.S. 641 (1997) 6

Ford v. Wainwright, 477 U.S. 399 (1986) 15

Galtieri v. United States, 128 F.3d 33 (2d Cir. 1997) 14

Gerstein v. Pugh, 420 U.S. 103 (1975) 9

Gibson v. Berryhill, 411 U.S. 564 (1973) 9

Godinez v. Moran, 509 U.S. 389 (1993) 15

Gomez v. United States District Court, 503 U.S. 653 (1992) 3

Gregg v. Georgia, 428 U.S. 153 (1976) 4

Harris v. Washington, 404 U.S. 55 (1971) 9

Heck v. Humphrey, 512 U.S. 477 (1994) 6, 7, 9

Hill v. Alaska, 297 F.3d 895 (9th Cir. 2002) 14

James v. Walsh, 308 F.3d 162 (2d Cir. 2002) 14

Johnson v. Reid, 124 S. Ct. 980 (2003) 14

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) 16

Mitchum v. Foster, 407 U.S. 225 (1972) 7, 8, 10

Muhammad v. Close, 124 S. Ct. 1303 (2004) 6, 8

Nguyen v. Gibson, 162 F.3d 600 (10th Cir. 1998) 15

Pennsylvania v. Union Gas, 491 U.S. 1 (1989) 8

TABLE OF AUTHORITIES – Continued

Page

Preiser v. Rodriguez, 411 U.S. 475 (1973) 6, 7

Reid v. Johnson, No. 03-7916 (4th Cir. Dec. 17, 2003) 14

In re Sapp, 118 F.3d 460 (6th Cir. 1997) 9

Schiro v. Farley, 510 U.S. 222 (1994) 15

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 8

Smalis v. Pennsylvania, 476 U.S. 140 (1986) 9

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) 11, 12, 13, 14

Tarver v. State, 761 So. 2d 266 (Ala. Crim. App. 2000) 16

Tarver v. State, 769 So. 2d 338 (Ala. Crim. App. 2000) 16

Teague v. Lane, 489 U.S. 288 (1989) 15

Ex parte Young, 209 U.S. 123 (1908) 9

Young v. Hayes, 218 F.3d 850 (8th Cir. 2000) 10

Zablocki v. Redhail, 434 U.S. 374 (1978) 9

STATUTES AND RULES

28 U.S.C. § 1257(3) 9

28 U.S.C. § 2244(b) 10, 11, 12, 13, 15

28 U.S.C. § 2254(b) 17

28 U.S.C. § 2254(c) 16

28 U.S.C. § 2283 8

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1997e(c) 10

TABLE OF AUTHORITIES – Continued

Page

ALA. CODE § 15-18-82.1(b) 2
ALA. R. CRIM. P. 32 16
ALA. R. CRIM. P. 32.1(e) 16
ALA. R. CRIM. P. 32.2(c) 16
FED. R. CIV. PRO. 12(b) 10
FED. R. CIV. PRO. 12(c) 10
FED. R. CIV. PRO. 56 10

MISCELLANEOUS

DEATH PENALTY INFORMATION CENTER, SEARCHABLE DATABASE OF EXECUTIONS, *available at* http://www.deathpenaltyinfo.org/executions.php 14

INTRODUCTION

Last April, when the State moved to set his execution date, Mr. Nelson took the highly unusual step of responding formally, in writing, with a copy to the clerk of the Alabama Supreme Court, that he did not oppose the execution.[1] He expressly stated that he would not challenge his death sentence and that he hoped that an execution date would be set expeditiously. J.A. 89.

Shortly before Mr. Nelson's transfer to Holman Prison, where the execution was to occur, his counsel took the further unusual step of contacting the Holman warden in an effort to assure that Mr. Nelson's execution by lethal injection would be carried out without problems despite his medical condition. J.A. 25-26. Counsel offered to make a private physician available to consult about the necessary procedure at Mr. Nelson's expense if the warden preferred that to a prison physician. J.A. 8-9. Counsel asked to review the lethal injection protocols so that any medical issues could be resolved in advance. J.A. 25-26. Mr. Nelson even offered to be executed by electrocution to avoid any injection problems that might arise.[2] J.A. 92-93.

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[1] In this letter, Mr. Nelson agreed "that an execution date should be set promptly by the court in the immediate future" and urged the State to take any necessary steps "to insure that an execution date be set in an expedious [sic] manner." J.A. 89. He stated that "he had no plans to contest [the] motion" to set an execution date, nor would his attorneys "be responding to [the] motion . . . , or seek a stay of execution in [his] behalf." *Id.*

[2] The State makes much of Mr. Nelson's failure to request electrocution during the thirty-day window in the summer of 2002 when death-sentenced inmates had an opportunity to do so under the transition provision of the statute that replaced Alabama's electric chair

(Continued on following page)

While acknowledging that Mr. Nelson did have a venous-access problem which would require some attention,[3] the warden rejected all offers of cooperation and assistance from Mr. Nelson and his counsel and rebuffed their efforts to obtain information about the State's injection-procedure protocols – if it had any – that might be employed to deal with this problem. The warden refused to provide assurances that qualified medical personnel or adequate medical support would be available to handle complications arising from Mr. Nelson's compromised veins, and then belatedly proposed a surgical procedure likely to result in gratuitous trauma and suffering. It was to avert this potentially torturous procedure, and for no other reason, that Mr. Nelson's present civil-rights action under 42 U.S.C. § 1983 was filed.

with lethal injection, ALA. CODE § 15-18-82.1(b) (1975). Resp. Br. 4, 28 n.8, 34. Of course, neither this provision nor Mr. Nelson's failure to invoke it is remotely relevant. Mr. Nelson has never objected to being executed by lethal injection; he had no reason, in the summer of 2002, to anticipate that Alabama would insist on performing the venous-access procedure *inhumanely*; and he offered to accept electrocution only as a lesser evil than the inhumane "cut-down" procedure with which he was suddenly confronted in the fall of 2003.

[3] *See* J.A. 93 ("The nurse reported to me that Nelson did not have any veins in his lower arms and hands sufficient to support a direct intravenous line.") (affidavit of Warden Culliver); *see also* J.A. 10 ("Defendant Culliver furthermore acknowledged to counsel for the Plaintiff that the Plaintiff's execution will be the first instance of the State of Alabama having to perform a medical procedure prior to the execution to gain venous access.") (Complaint for Injunctive and Declaratory Relief); J.A. 51 ("the protocol that is going to be planned for this execution is a little different than the ones that we've had. . . . ") (counsel for the State at in-chambers telephone conference).

The State rests its argument that Mr. Nelson's § 1983 complaint should be barred as a successive habeas corpus petition on the general proposition that death-row prisoners are prone to file vexatious pleadings aimed at thwarting executions, not on the facts of Mr. Nelson's own case. Mr. Nelson's case presents a very different situation than the one the State purports to fear – a situation wholly remote and readily distinguishable from any inmate's efforts to avoid or delay an execution.[4] Mr. Nelson accepts the inevitability of his execution and seeks only to have it conducted without needless brutality.

Mr. Nelson's § 1983 action does not challenge his death sentence or any aspect of the criminal proceedings or judgment that authorizes his execution. No relief he could obtain in this action would invalidate those proceedings or that judgment in whole or in part. Mr. Nelson's complaint questions only the decision of a prison official to conduct a potentially excruciating surgical procedure as the unnecessary prelude to his execution. J.A. 67. It does not question lethal injection as a mode of execution and does not dispute that the State is entitled to obtain venous access through any necessary, medically appropriate procedures, including surgical procedures. Mr. Nelson asks only to have judicial protection against *un*necessary and ill-advised surgery performed by unqualified state agents at the warden's *ad hoc* behest and which exposes him to

[4] *Compare Gomez v. United States District Court*, 503 U.S. 653 (1992).

"the gratuitous infliction of suffering"[5] in violation of the Eighth Amendment.

ARGUMENT

I. MR. NELSON'S COMPLAINT IS COGNIZABLE UNDER § 1983.

The State concedes that "State prisoners in Nelson's shoes – *i.e.*, those who have previously filed federal habeas petitions – may of course file § 1983 complaints challenging the conditions of their confinement." Resp. Br. 22. However, it asserts that Mr. Nelson's complaint "Directly Challenges the Imposition of His Death Sentence." Resp. Br. 23. There is no basis for that characterization in the record. Rather, Mr. Nelson has explicitly, consistently, and repeatedly disavowed challenging his death sentence or its imposition.

The State argues that because venous access is required before a lethal injection can be carried out, Mr. Nelson's § 1983 complaint necessarily challenges his sentence. However, the complaint does not contest the State's right to obtain access to Mr. Nelson's veins. It does not contest the State's use of surgical procedures for that purpose, or the State's use of any other procedures necessary to carry out Mr. Nelson's execution. That the physical abuse which is the sole subject of Mr. Nelson's constitutional complaint will occur in the course of preparing him for execution does not convert that complaint into an

[5] *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

attack on his death sentence.[6] Nor should it insulate the abuse from legal scrutiny.

The State's repeated contention that the relief sought by Mr. Nelson "would seemingly prevent the State from carrying out his death sentence *at all*" (Resp. Br. 34; *see also id.* at 1, 12, 17, 21, 24-35, 44, 48) is a complete fiction. Nothing in the cause of action pleaded by Mr. Nelson's § 1983 complaint and now before this Court would or will support any form of relief that prevents his execution. And the only reason why the adjudication of the complaint has required even a temporary stay of execution is that the State waited until six days before the scheduled execution date to unveil its latest plans for a "cut-down" surgical procedure and then persisted in those plans rather than conducting settlement discussions as suggested by the district court below – discussions that Mr. Nelson's counsel expressed an immediate willingness to pursue.[7]

[6] Constitutional issues concerning *the particular method* by which a State undertakes to access a prison inmate's veins can arise in situations having nothing to do with a scheduled execution. If the State required venous access to Mr. Nelson for HIV or other blood testing, or some other incident of prison existence, and proposed to obtain it through the use of unqualified personnel in a medically inappropriate manner that creates a needless risk of pain, Mr. Nelson could bring a § 1983 action alleging essentially the same cause of action. And here, indeed, the State originally proposed addressing Mr. Nelson's medical problems *twenty-four hours before* his scheduled execution. J.A. 11.

[7] During an in-chambers telephone conference, the district court inquired as to whether there was "any likelihood that you lawyers could get together and agree on a procedure that would be acceptable to both sides for the location of the vein." J.A. 73. In response, Mr. Nelson's attorney stated, "I would certainly be open to that." *Id.* Mr. Nelson's willingness to resolve this case through such an agreement demonstrates the baselessness and unfairness of the State's contention that Mr. Nelson's actual intent is to avoid his execution.

A. *Heck* and *Preiser* Authorize the Review Sought By Mr. Nelson.

The State argues that Mr. Nelson cannot maintain his § 1983 action under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Heck v. Humphrey*, 512 U.S. 477 (1994), because he seeks injunctive relief. The State says that "[b]y its own terms, *Heck* is inapplicable to Nelson's suit which seeks purely injunctive relief rather than monetary damages." Resp. Br. 32. Neither *Heck* nor any other decision of this Court will support such a reading.

Heck holds that a claim is properly cognizable under § 1983 if a judgment in favor of the plaintiff would not "necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487. Although *Heck* announced this rule in the context of a claim for money damages, there is nothing in *Heck*'s language or logic to suggest that the rule is limited to such claims; and *Heck* has not been so limited in subsequent decisions. For example, *Edwards v. Balisok*, 520 U.S. 641 (1997), involved a § 1983 action by a prison inmate alleging that certain disciplinary hearing procedures violated due process and seeking three types of relief: (1) money damages; (2) declaratory relief; and (3) prospective injunctive relief. In remanding the claim for prospective injunctive relief, the Court observed that "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good time credits, and so may properly be brought under § 1983." 520 U.S. at 649 (quoting *Heck*, 512 U.S. at 487). *See also Muhammad v. Close*, 124 S. Ct. 1303, 1304 (2004) (per curiam) (recognizing that *Edwards* "applied *Heck* in the circumstances of a § 1983 action claiming damages *and equitable relief* for a procedural defect in a prison administrative process. . . . ") (emphasis added).

In any event, the rules laid down by *Preiser* and by *Heck* do not differ in any way that is material for present purposes. The rule of *Preiser* is that a state prisoner must proceed by way of habeas corpus and cannot file an action under § 1983 when "challenging the very fact or duration of his physical imprisonment." 411 U.S. at 500. *Preiser* precludes a § 1983 suit for an injunction if – but only if – "the relief [that the plaintiff] seeks is a determination that he [or she] is entitled to immediate release or a speedier release from . . . imprisonment." *Id.* Mr. Nelson's § 1983 suit seeks no such relief, and *Preiser* therefore does not bar it.

B. A Federal Court Has Authority to Grant the Relief Sought by Mr. Nelson Under § 1983.

Mr. Nelson's request for a stay of execution to enable the district court to adjudicate his Eighth Amendment challenge to the proposed "cut-down" procedure before it was used on him did not take his suit "outside § 1983's ambit." Resp. Br. 12. There is no basis for the State's contention that "[b]ecause a request for a stay of execution entails a federal interference with state penal interests at least as grave – if not more so – than the request for speedier release at issue in *Preiser*, federal courts may not stay impending executions under § 1983." Resp. Br. 12; *see also id.* at 40-42. This Court has repeatedly held that federal courts are empowered to enjoin a state's unconstitutional conduct; and in *Mitchum v. Foster*, 407 U.S. 225, 243 (1972), the Court recognized that § 1983 suits are "expressly authorized" exceptions to the Anti-Injunction

statute, 28 U.S.C. § 2283.[8] *Mitchum*, indeed, observed that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Id.* at 242; *cf. Pennsylvania v. Union Gas*, 491 U.S. 1, 41-42 (1989) (Scalia, J., concurring) (noting that the Civil Rights Act of 1871 was intended to be a "limitation[ ] of the power of the States and enlargement[ ] of the power of Congress"), *overruled on unrelated grounds by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).[9] Across a wide

[8] 28 U.S.C. § 2283 provides that a federal court may not grant an injunction staying state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[9] Mr. Nelson does not suggest that *Mitchum* exempts § 1983 suits from comity concerns or from requirements that a plaintiff pursue appropriate state procedures for redress before resorting to federal court. However, because Mr. Nelson here did exhaust all available state procedures, his ultimate recourse to federal court was proper. Mr. Nelson gave the State every possible opportunity to address his concerns administratively. There are no applicable formal grievance procedures at the Holman Correctional Facility, but he and his counsel made repeated efforts to communicate with the warden and the Department of Corrections. J.A. 25-26, 27-28, 92. The State did not raise any claim of non-exhaustion of state remedies in the district court or identify any other administrative processes that Mr. Nelson could have pursued but did not. Its belated non-exhaustion arguments should not be heard in this Court in the first instance. They are either waived or, to the extent that they have not been waived and that they have any remotely colorable foundation, they can be addressed on the basis of informed local knowledge after adequate factual development in the district court on remand. *Cf. Muhammad v. Close*, 124 S. Ct. 1303, 1307 (2004) (per curiam) (a defense is waived if the defendant failed to raise it below "when its legal and factual premises could have been litigated").

range of circumstances, this Court has not hesitated to intervene or uphold federal intervention in state proceedings when an individual claiming the protection of a federal constitutional right would otherwise be subject to the irremediable denial of that right[10] or could not assert the right elsewhere.[11] *See generally Ex parte Young*, 209 U.S. 123 (1908). In his principal brief at page 34 n.28, Mr. Nelson cited a number of cases in which federal courts have granted or upheld stays of execution pending the outcome of a § 1983 action.[12] "And this Court long ago

[10] The double jeopardy cases are paradigmatic. *See, e.g., Smalis v. Pennsylvania*, 476 U.S. 140, 143 n.4 (1986) (concluding that the Court had jurisdiction under 28 U.S.C. § 1257(3) to address a double jeopardy issue arising from the Pennsylvania Supreme Court's determination that the defendant, previously acquitted due to insufficiency of the evidence, could be retried); *Harris v. Washington*, 404 U.S. 55, 56-57 (1971) (per curiam) (approving federal court intervention when the state courts refused to dismiss a prosecution challenged on double jeopardy grounds).

[11] *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978) (holding that abstention principles do not bar a federal suit challenging the constitutionality of a marriage statute when there is no currently pending state court proceeding in which to raise the challenge); *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (upholding a federal suit that challenged pretrial detention of state criminal defendants without a probable cause hearing, because the harm of allegedly unconstitutional pretrial incarceration could not be remedied in or by any ongoing state court proceedings); *Gibson v. Berryhill*, 411 U.S. 564, 572 (1973) (approving a federal suit challenging ongoing state license-revocation proceedings where the licensing board was found to be biased against the plaintiff); *see also Heck v. Humphrey*, 512 U.S. 477, 503 (1994) (Souter, J., concurring).

[12] The State and its amici inaccurately state that the Sixth and Eighth Circuits have adopted a bright line rule that "federal courts lack jurisdiction to stay executions under § 1983." *See* Resp. Br. 40; Br. of Ohio, *et al.*, as Amici Curiae 9. However, neither circuit has assumed such a position. *See In re Sapp*, 118 F.3d 460, 463-64 (6th Cir. 1997)

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recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum*, 407 U.S. at 242. There are ample safeguards against potential abuses of this federal injunctive authority, making it unnecessary and imprudent to deny the authority altogether.[13] *Id.* at 243.

II. EVEN IF MR. NELSON'S § 1983 COMPLAINT WERE TO BE TREATED AS A HABEAS CORPUS PETITION, IT WOULD NOT BE BARRED AS A SUCCESSOR BECAUSE, LIKE THE HABEAS PETITION AT ISSUE IN *MARTINEZ-VILLAREAL*, IT PRESENTS A CLAIM THAT WAS NOT RIPE AT THE TIME OF ANY PRIOR HABEAS PROCEEDINGS.

The State argues at length in its brief that the Eighth Amendment issue presented by Mr. Nelson's § 1983 action could not meet the requirements for a successive habeas corpus filing under 28 U.S.C. § 2244(b). Mr. Nelson does not dispute that and never has. Rather, Mr. Nelson has

(examining the merits of plaintiff's § 1983 claim despite plaintiff's request for a stay of execution); *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (granting a stay of execution based on plaintiff's § 1983 complaint challenging the constitutionality of clemency procedures).

[13] Defendants in § 1983 actions can seek early dismissal of the proceedings under FED. R. CIV. PRO. 12(b) or move for prompt judgment on the pleadings pursuant to Rule 12(c) or Rule 56. And in cases brought by prison inmates, a district court can summarily dismiss a petition *on its own motion* under 42 U.S.C. § 1997e(c) if it appears to be "frivolous, malicious, [or] fails to state a claim on which relief can be granted. . . ."

simply pointed out that if this Court deems that habeas corpus is the preferred procedure for resolving the constitutional issues raised by his unique circumstances, the recharacterization of his § 1983 complaint as a habeas corpus application would not require its preclusion as a second or successive application.[14] On this point, *Stewart v.*

[14] When questioned by the district court below, counsel for Mr. Nelson acknowledged that Mr. Nelson had "been through the federal system and the state system at least once" and that "if this was a successive 2254, we would certainly have to get permission" from the court of appeals to file it. J.A. 64. He also acknowledged that Mr. Nelson's constitutional challenge to the warden's proposed cut-down procedure for obtaining venous access would not meet the § 2244(b)(2)(B)(ii) requirement for "gatekeeper" permission because "obviously, Your Honor, I mean our claim does not have anything to do with factual innocence." J.A. 70. But counsel nowhere conceded that Mr. Nelson's § 1983 complaint *would* be a "successive 2254" if it were treated as a habeas petition. *See generally* J.A. 64-65, 69-70, 72. The court of appeals misread the record when it took the view (in footnote 2 of its opinion, at J.A. 119-20) that counsel's concession went that far. Counsel's first response to the district court's question "Why have you waited until now [to file the challenge to the "cut-down" procedure]" was that "it really didn't become ripe until he got to Holman." J.A. 65. The district court then pressed counsel with questions as to whether this circumstance would bring the case within § 2244(b)(2)(B) (*see, e.g.*, J.A. 69: "Why couldn't this fall within a factual predicate that wasn't discovered previously?") and counsel replied that even if the new-factual-predicate requirement of § 2244(b)(2)(B)(i) were satisfied, the factual-innocence requirement of § 2244(b)(2)(B)(ii) would not be; thus, counsel was concerned that under the Eleventh Circuit's habeas precedents, gatekeeper permission could not possibly be obtained. The district court continued to explore the basis for this concern and counsel continued to explain that he could not expect to get "gatekeeper" authorization from the Eleventh Circuit *if* he sought it on the theory that Mr. Nelson's present proceeding was a second or successive habeas application:

> [THE COURT]: But let's get back to the habeas issues. So you're saying that under 2244, you can't challenge a last minute claim of cruel and unusual punishment in the

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Martinez-Villareal, 523 U.S. 637 (1998), is clear and unmistakably controlling. Pet. Br. 36-37.

The State devotes curiously little attention and no real analysis to *Martinez-Villareal*. While Martinez-Villareal's competency-to-be-executed claim had been raised in an earlier petition than the one this Court held entertainable without "gatekeeper" authorization under 28 U.S.C. § 2244(b)(3), that fact was not important in this Court's reasoning. Instead, the Court focused on the fact that the claim was not ripe until after Martinez-Villareal's initial habeas corpus proceedings had been concluded and thus could not have been raised in those previous proceedings. *Id.* at 643, 645 (at the point when "it became clear that [Martinez-Villareal] would have no federal habeas relief for his conviction or his death sentence, and the Arizona Supreme Court issued a warrant for his execution . . . [h]is claim then [became] unquestionably ripe";

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manner of execution, assuming those facts did not arise until the last minute. That's your concern, Mr. McIntyre?

MR. McINTYRE: Judge, I'm sorry, would you say it one more time?

THE COURT: Is your concern that you *might not be able* to raise an Eighth Amendment claim to the manner of execution even if those facts that give rise to the claim did not arise until the last minute?

MR. McINTYRE: Yes.

THE COURT: *As long as you were subject to a successive petition rule.*

MR. McINTYRE: Yes.

J.A. 71-72 (emphasis added).

Martinez-Villareal "brought his claim in a timely fashion, and it has not been ripe for resolution until now").[15]

Just as the competency-to-be-executed claim in *Martinez-Villareal* was previously unripe and therefore outside the purview of the "second or successive habeas corpus application" provisions of § 2244(b)(2) and (3), Mr. Nelson's claim did not ripen until the State proposed using a "cut-down" procedure to gain venous access, long after all normal federal habeas corpus proceedings in Mr. Nelson's case had been finally adjudicated. It bears repeating – the more so because of the State's efforts to obscure these central facts in a cloud of concealing dust – that:

(1) Alabama did not even *have* lethal injection as its means of execution when Mr. Nelson's single federal habeas corpus proceeding was finally decided adversely by the United States Court of Appeals for the Eleventh Circuit in June of 2002;

(2) Mr. Nelson could not possibly have complained about the warden's plans to employ a "cut-down" procedure for obtaining venous access until

   (a) Alabama adopted lethal injection as its mode of execution, and

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[15] It is true that the Court in *Martinez-Villareal* left open the question whether the claim would have been cognizable if it had not been presented in Martinez-Villareal's initial federal habeas corpus petition. *Id.* at 645 n.*. But nothing in the rationale of *Martinez-Villareal* can logically support a distinction between previously-presented-but-unripe claims and claims not previously presented because they were unripe.

(b) the warden decided and announced his plans regarding the "cut-down" procedure, which

(c) the warden did not announce – and apparently did not even decide – until about a week before Mr. Nelson's scheduled execution in October of 2003.

Under these extraordinary circumstances,[16] the State's position that Mr. Nelson's sole means of challenging the "cut-down" procedure is a "second or successive" habeas petition ineluctably dismissible as such amounts to the self-same *either-too-early-or-too-late-and-therefore-never* argument that the Court in *Martinez-Villareal* rejected as "perverse." *Id.* at 638.[17]

[16] The extreme novelty of the circumstances of Mr. Nelson's case is evident when one considers the number of lethal injections in the United States that have occurred without reported problems related to a prisoner's medical condition. Nationwide, there have been approximately 734 executions by lethal injection since 1976, and in only a few cases has an issue about compromised veins been reported. *See* DEATH PENALTY INFORMATION CENTER, SEARCHABLE DATABASE OF EXECUTIONS, *available at* http://www.deathpenaltyinfo.org/executions.php (last visited Mar. 15, 2004) (indicating that 734 people have been executed by lethal injection since 1976); *Cooper v. Rimmer*, __ F.3d __, No. 04-99001, 2004 WL 232377 (9th Cir. Feb. 8, 2004) (questioning the propriety of a potential cut-down procedure); *Reid v. Johnson*, No. 03-7916 (4th Cir. Dec. 17, 2003) (order granting stay of execution), *motion to vacate stay denied sub nom., Johnson v. Reid*, 124 S. Ct. 980 (2003) (same).

[17] *See also, e.g., James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002) (holding that when a subsequent habeas petition contains a new claim that could not have been raised in the prior habeas petition, the court will not consider that newly discovered claim successive) (citing *Galtieri v. United States*, 128 F.3d 33, 37-38 (2d Cir. 1997)); *Hill v. Alaska*, 297 F.3d 895, 899 (9th Cir. 2002) (holding that claims relating to a prisoner's parole that were never addressed by a district court and could

(Continued on following page)

III. THERE ARE NO PROCEDURAL BARRIERS TO REVIEW OF MR. NELSON'S CLAIM.

The State argues for the first time in its merits brief to this Court that Mr. Nelson's claim is "in all likelihood barred by *Teague v. Lane*, 489 U.S. 288 (1989)." Resp. Br. 21. But the State never raised any *Teague* contention in the lower courts or in its Brief in Opposition to Certiorari and its *Teague* defense should not be entertained here. *See, e.g., Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993); *Schiro v. Farley*, 510 U.S. 222, 229 (1994). The State's *Teague* contention is vacuous in any event, because Mr. Nelson seeks no new rule of constitutional criminal procedure that would implicate *Teague*. His claim neither "breaks new ground [n]or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. The State's obligation to avoid the infliction of unnecessary pain in carrying out an execution has been

not have been presented in earlier petitions were not successive; therefore, the prisoner need not obtain "gatekeeper" permission to file his petition); *Crouch v. Norris*, 251 F.3d 720, 725 (8th Cir. 2001) (holding that a "petition, which neither raises a claim challenging [petitioner's] conviction or sentence that was or could have been raised in his earlier petition, nor otherwise constitutes an abuse of the writ, is not 'second or successive' for purposes of § 2244(b)"); *In re Cain*, 137 F.3d 234, 236-37 (5th Cir. 1998) ("Congress did not intend for the interpretation of the phrase 'second or successive' to preclude federal district courts from providing relief for an alleged procedural due process violation relating to the administration of a sentence of a prisoner who has previously filed a petition challenging the validity of his conviction or sentence, but is nevertheless not abusing the writ."); *Nguyen v. Gibson*, 162 F.3d 600, 601 (10th Cir. 1998) (dismissing claim under *Ford v. Wainwright*, 477 U.S. 399 (1986) that could have been raised in prisoner's first habeas petition, but specifically noting that it would be a different situation if the prisoner's claim only became known after his first federal habeas petition was filed).

established constitutional law for more than half a century. *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).

The State contends alternatively that "Nelson has made no effort whatsoever to exhaust his state remedies . . . [although] 28 U.S.C. § 2254(c) . . . [requires that an] inmate must exhaust 'any available procedure' for raising his claim in state court." Resp. Br. 20. This, too, is a point entirely without merit. At the time when Mr. Nelson's Eighth Amendment claim arose, there were no state court procedures available through which he could raise it. The Alabama courts refuse to entertain constitutional challenges to procedures relating to an execution after a condemned inmate's two-year statute of limitations for post conviction filings under Rule 32 of the Alabama Rules of Criminal Procedure has passed,[18] even when a claim rests on newly discovered evidence.[19] And the procedures suggested by the State (Resp. Br. 46) for requesting the Alabama Supreme Court to postpone setting an execution date have no application to Mr. Nelson's situation precisely *because* his federal constitutional claim does not go to the fact of his execution or its timing as such but solely to the

[18] *See Tarver v. State*, 761 So. 2d 266 (Ala. Crim. App. 2000). Pursuant to ALA. R. CRIM. P. 32.2(c) Mr. Nelson had two years from the date on which his direct appeal was concluded in the state court system to file his state post conviction petition. Mr. Nelson's direct appeal was concluded on September 24, 1996. Thus, his state postconviction petition was due September 24, 1998.

[19] *See Tarver v. State*, 769 So. 2d 338 (Ala. Crim. App. 2000). In any event, Mr. Nelson could not have sought relief on a theory of newly discovered evidence because the facts underlying his claim do not go to factual innocence, and newly-discovered-evidence claims must meet the factual innocence requirement of ALA. R. CRIM. P. 32.1(e) to be cognizable in state postconviction proceedings.

way the warden plans to accomplish venous access physically. Because there is "an absence of available State corrective process" for this claim, its exhaustion is neither possible nor required. 28 U.S.C. § 2254(b)(1)(B)(i).

CONCLUSION

The State's brief offers no grounds on which the decision below can be upheld. The Court of Appeals should be reversed and the case remanded for a determination of the merits of Mr. Nelson's federal constitutional claim that the "cut-down" procedure would constitute the infliction of cruel and unusual punishment forbidden by the Eighth Amendment.

Respectfully submitted,

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